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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 947

FONTANA AVIATION, INC., A CORPORATION,
Petitioner,

vs.

BEECH AIRCRAFT CORPORATION, A CORPORATION,
AND HARTZOG-SCHNECK AVIATION, INC.,
A CORPORATION,
Respondents.

REPLY BRIEF FOR PETITIONER FONTANA AVIATION, INC.

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THE GUTHROP-WARREN PRINTING COMPANY, CHICAGO

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Respondents argue that this Court should deny review because the case (1) allegedly involves only a refusal to disturb the trial court's *discretionary* grant of a new trial, (2) is interlocutory, and (3) is not of sufficient importance to warrant this Court's attention.

Respondents do not seriously dispute any of the matters set out in our statement of the case. They do suggest, however, that because Fontana allegedly was unable to generate significant new plane sales while operating under the conspiracy restraints and prior to development of the corporate plane market, the testimony of its officer that it

would have completed sales in the 24 year period following termination was not to be believed. This, of course, was an issue for the jury, and both the trial judge and Court of Appeals credited this testimony. However, contrary to respondents' implication, the evidence showed that Fontana sold or would have sold but for the conspiracy restraints, five airplanes in the corporate class in the fifteen month period prior to termination at a gross sale price of approximately $1,000,000 (A. 659-70, 1788-80). At the estimated 10% profit this pre-termination experience would have projected to a $200,000 loss of profit during the post termination period, virtually the amount estimated by Fontana's officer. Further, Fontana's estimate of lost sales was corroborated by Hartzog's own sales experience and was reasonable in terms of quotas assigned by Beech for Hartzog's entire distributor territory (PX 135-149, A. 1719-1806; PX 111, A. 1645, 1650). As to petitioner's cumulative loss of $32,000 referred to by respondents, it is sufficient to point out that petitioner realized an operating profit of $23,500 on plane sales made in 1965, the last year prior to their termination, and in addition, the $69,000 of damages shown for the pre-termination period, the sufficiency of which respondents concede, would have changed the so-called cumulative loss into a $37,000 profit (A. 1844-5; 1680).

ARGUMENT.

I.

THE TRIAL COURT DID NOT GRANT THE NEW TRIAL ON DISCRETIONARY GROUNDS.

Respondents incorrectly state that the question presented by the petition is "Whether the Court of Appeals erred as a matter of law in declining to disturb the trial court's discretionary grant of a new trial in the particular circumstances of this case" (R. br. p. 1).

No exercise of discretion was involved in the grant of the new trial. The new trial order was based solely on a mistake of law. The trial court granted respondents' motion for judgment N. O. V., and alternatively for a conditional new trial, on the ground that petitioner had failed to prove the fact of damage. The trial court reached this conclusion after rejecting the damage proofs for reasons which the court below expressly holds to be erroneous as a matter of law.

In granting judgment notwithstanding the verdict the trial judge stated he was doing so because "the evidence, without regard to issues of credibility, *indicates that plaintiff was not damaged* in [any of the] instances discussed and, therefore, that the jury's verdict was in error." In a merely formal compliance with Rule 50(c), and without further discussion, the court in the next sentence said, "Defendants' motion for a new trial is conditionally granted, should this judgment be vacated or reversed. Rule 50(c), Fed. R. Civ. P." (App. B. p. 15). The accompanying judgment order recites that the new trial "is granted on the

grounds set forth in the Court's memorandum opinion" (App. B. p. 17).[1]

Necessarily then, the grant of a new trial was on the same mistaken legal grounds as the grant of judgment N. O. V. There was no attempt by the trial judge to independently justify or assign additional grounds for his new trial order. Even the court below acknowledges this to be the fact, stating:

> "The granting of the new trial conditionally was predicated on the *same* grounds supporting the granting of the motion for judgment n. o. v., presumably that there was no fact of damage. There is no indication in the court's memorandum opinion or order that the new trial was conditionally granted because of a failure to prove an antitrust case" (App. B. p. 22).

Obviously, if, as the Seventh Circuit held (App. B. p. 30), the jury determination of the fact of damage issue was not, as the trial judge had held, against the "overwhelming weight of the evidence",[2] it could not be against the clear or manifest weight of the evidence for new trial purposes.

1. In this connection it should be noted that the trial court similarly granted petitioner's motion for judgment N. O. V. on the counterclaim and conditionally granted a new trial. The only ground assigned was the legal ground that Hartzog was not the party injured within the meaning of Section 4. No additional ground was assigned for the conditional grant of a new trial (App. B. pp. 14, 15, 16, 22, 32). Obviously, if the Court of Appeals had held Hartzog was the party injured and not merely a conduit, the new trial order would also fall and could not be saved by any claim of "exercise of discretion."

2. The trial judge's use of the phrase "overwhelming weight of the evidence" in ruling on the N. O. V. motion is the N. O. V. test under the Illinois case of *Pedrick* v. *Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494, 229 N. E. 2d 504 (1967) which the trial judge said he was applying rather than the *Brady* standard, 320 U. S. 476 (1943) (App. B. p. 5). As we have pointed out and as appears from the trial judge's opinion he did not purport to dismiss the damage proofs on credibility or weight of evidence grounds, but rather on legal grounds.

Locke v. *Atchison, Topeka and Santa Fe Railway Company*, 309 F. 2d 811, 817 (10th Cir. 1962). This is particularly the case where the Court of Appeals has held that the fact of damage "would appear to be implicit" in the violations proven and "flows naturally and expectedly from such activity" (App. B. pp. 28, 29).

Recognizing this inconsistency respondents would have it appear that the trial court did not limit his ruling to the fact of damage issue, but in granting respondents' alternative motion for a new trial exercised his discretion with respect to the *amount* of damage. Thus in their brief in opposition respondents state:

> "Among the grounds presented for a new trial was the proposition that the verdict, both in determination of liability and in amount of assessed damages, was contrary to the clear weight of the evidence, and would, if permitted to stand, result in a miscarriage of justice" (R. br. pp. 3-4).

After pointing out that the trial court did not decide but merely assumed the existence of an antitrust violation in ruling on the N. O. V. motion, respondents further state (R. br. p. 4, 7):

> "[The trial judge] ruled that respondents were entitled to judgment n. o. v. because, even assuming *arguendo* that an antitrust violation had been established, petitioner had failed to present evidence on the question of damages *adequate* to support a jury verdict in its favor. Based upon the sate of the record on this same issue, the court also *exercised its discretion* to grant, in the alternative, a new trial."
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> "The result reached below represents, not usurpation of the jury's functions, but the application of well-settled principles by which a trial court, exercising sound judicial discretion, may act to prevent a miscarriage of justice."

Respondents' position that the trial judge exercised his discretion with respect to the amount of damages, cannot be reconciled with either the trial court's opinion or the position taken by respondents in the court below.

In his opinion the trial court said he was deciding the case only on the fact of damage issue. After acknowledging that the jury "may make a reasonable estimate of the damages based on all relevant data and inferences" once the fact of damage is established, he stated (App. B. p. 12):

> "*However, our discussion is concerned not with the reasonableness of the jury's calculations, but with the fact that they thought an injury had been proved.*" (Emphasis added)

Moreover, in their brief in the court below, respondents conceded that the trial court never reached the question of damage amount and therefore obviously did not purport to exercise any discretion on this issue. They stated (R. br. p. 3):

> "Nor did [the trial court] pass upon the question whether defendants should receive a new trial because plaintiff's case as to injury was in whole or in part based on false evidence or *whether the amount of the verdict was against the clear weight of the evidence*, or was such that a miscarriage of justice would result if it was permitted to stand." (Emphasis added)

Thus, clearly the trial court did not purport to exercise his discretion with respect to the amount of the verdict. Rather, he committed an error of law in ruling on the motion for judgment N. O. V., and that error necessarily invalidates the new trial order as well since that order was based on the same erroneous legal grounds. The new trial order automatically falls with the reversal of the judgment N. O. V. and cannot be saved by any claimed exercise of discretion because no discretion was involved in granting a conditional new trial.

II.

THE CASE IS "RIPE FOR REVIEW" BECAUSE THE COURT CAN FINALLY DISPOSE OF IT ON THE MERITS.

Respondents argue that the case is interlocutory and therefore "not yet ripe for review by this Court" (R. br. pp. 5-6). While the case is interlocutory in the sense that it is not final because of the new trial order, it is certainly "ripe for review". Under the decisions of this Court and the opinion of the court below, petitioner has fully and completely discharged its burden of proof. Petitioner proved a *per se* violation of the Sherman Act, loss of its valuable dealership as a result, and damages by competent evidence in more than the amount of the jury verdict. The jury was properly instructed as to the standards to be applied in determining damages. Nothing occurred in the conduct of the trial which might have prejudiced the jury's deliberations or prevented it from reaching a fair verdict.

Review at this time need not therefore result in a piecemeal disposition because the posture of the case is such that this Court can finally and completely dispose of it on the merits. Indeed, this Court would be justified in reinstating the jury verdict in petitioner's favor on the basis of the Court of Appeals' opinion because the error in requiring a second and unnecessary trial to prove again what the court has held petitioner proved at the first trial is apparent from the court's statement of the case and requires no independent review of the record.

III.

THIS CASE IS IMPORTANT TO THE EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS.

Respondents argue that this case is not of sufficient importance to warrant this Court's attention. This argument is advanced notwithstanding the fact that the decision of the court below in refusing to disturb the new trial order sanctions a result directly in conflict with the decisions of this Court.

Those decisions establish that the jury's determination of the cause of injury and of its amount supported by the evidence is conclusive (Pet. pp. 19-21). Absent a showing that something occurred which may have prejudiced or tainted the verdict, it cannot be disturbed.

The fact that the court below acknowledges that under *Bigelow* "once there is sufficient evidence of the fact of damage to go to the jury, the assessment of the amount is largely a matter of the jury's consideration of all the evidence" (App. B, p. 31) does not make the conflict any less real. The Court of Appeals not only held that there was sufficient evidence of the fact of damage to go to the jury, but that damage was "implicit" and "flowed naturally" from the violation, thereby foreclosing any claim that the jury's verdict was against the manifest weight of the evidence. Nevertheless, under the decision of the court below petitioner must begin again and prove its case to the satisfaction of another twelve jurors.

It is this kind of disposition which pays lip service to the decisions of this court but denies plaintiffs the relief to which they are entitled that seriously threatens to undermine the efficacy of treble damage actions. It makes little difference to defendants how they win. A victory by attrition serves their purpose just as well and further serves to discourage other potential litigants. With the aid of the

lower courts, the new trial device is becoming an increasingly more effective weapon in defendants' arsenal.

This Court has repeatedly recognized the importance and deterrent effect of treble damage actions and has never permitted the fact that a petitioner may be only a small businessman to deter it from granting review. Indeed, this Court emphasized in *Klor's* (359 U. S. 207, 213) that a violation of the antitrust laws "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."

Certainly this Court has an interest in seeing that its decisions are followed and effectively enforced in the antitrust area. Compliance with this Court's mandates is a matter of general importance and not merely a matter of concern to the litigants in this action.

CONCLUSION.

For the reasons stated herein and in our petition, a writ of certiorari should issue to review the judgment and opinion of the court below.

Respectfully submitted,

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